**PHUAH CHOON HWANG & ORS.**

**v.**

**HASSAN & KONG YEAM**

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING PETITION NO. 7 OF 1984]
24 FEBRUARY 1986

***LEGAL PROFESSION:*** *Bills of costs - Taxed - Solicitor and client basis - Outside time period in s. 126 of Legal Profession Act 1976 - Section 128(2) of the Act - Court's inherent jurisdiction - Justice of the case - Special circumstances.*

***CIVIL PROCEDURE:*** *Duty of Court - Inherent jurisdiction of the Court - When exercised - Statutory jurisdiction - Not a bar - Injustice of case - Court's discretion.*

The petitioners, who are residents of Singapore, had, in 1974 retained the respondents as their solicitors in a case which involved the distribution of the estate of one Phuah Eng Seang, deceased, under the Probate and Administration Act 1959. In June of 1983, the respondents informed the petitioners' solicitors in Singapore that in lieu of taxation they would like to deduct from the estate money a certain sum for their professional fees, charges and disbursements. The petitioners' solicitors protested and asked the respondents to have their bills of costs taxed. Subsequently, 3 months later the respondents forwarded to the petitioners' solicitors two sets of bills of costs which were later handed to their present solicitors Messrs. Shearn Delamore and Company for further action.

On 28 September 1984, the present solicitors filed this petition which prays for an Order of Course that the two bills of costs of the respondents be taxed on a solicitor and client basis. The petitioners' solicitors also filed an application by way of summons-in-chambers on January 1985 for an order that the time limited by s. 126 of the Legal Profession Act (the Act) for the filing of this petition be extended.

The Judge held that s. 126 of the Act was not applicable in this case since the two bills of costs were delivered by the respondents on 7 September 1983 and the originating petition as a matter of course was only filed after one year, that is, on 28 September 1984. The Judge then said this case came under s. 128 of the Act. The respondents contended that under s. 128(2) of the Act the petitioners were barred from obtaining any order for taxation.

The issue in this case was whether there was such an injustice which requires the exercise of the Court's inherent jurisdiction which was necessary to put right what would otherwise be a clear injustice to the applicants.

**Held:**

**[1]** Section 126 of the Act is concerned with the statutory right of the party chargeable to obtain an order for taxation of delivered bill of costs within the stipulated period of time from the delivery of the bill.

**[2]** Section 128 of the Act prescribes a time limit for taxation of bills of costs and in particular provides that such order for taxation shall not in any event be made after the expiry of one year from the delivery of the bill of costs.

**[3]** The authorities show that the inherent jurisdiction of the Court is exercised independent of the statute (see *Storer & Co. Ltd. v. Johnson* [1890] 15 AC 203 at 206, *Re a Solicitor* [1961] 2 All ER 321, *Harry Lee Wee v. Haw Par Brothers International Ltd.* [1980] 2 MLJ 228, *Symbol Park Lane v. Steggles Palmer* [1985] 2 All ER 167).

**[4]** After taking into consideration all the circumstances of this case, it was held that there was a need for the petitioners' solicitors at that point of time to verify certain items and documents from a certain relevant person. In the circumstances, this is a proper case where the Court's inherent jurisdiction should be exercised by ordering taxation of both bills of costs because justice requires that such an order should be made, notwithstanding that the petitioners' solicitors had allowed the twelve-month period to elapse without making this application.

*[Order in terms of the application. The two bills of costs be set down for taxing by the Registrar to a date to be fixed. Costs to be paid by the petitioners to the respondents]*

**Cases referred to:**
*Harry Lee Wee v. Haw Par Brothers International Ltd. [1980] 2 MLJ 228*
*Symbol Park Lane Ltd. v. Steggles Palmer (a firm) [1958] All ER 167*
*Stores & Co. Ltd. v. Johnson [1890] 15 AC 203*
*Re Johnson & Weatherall [1888] 37 Ch D 433*
*Re a solicitor [1961] 2 All ER 321, [1961] Ch 491*

**Legislation referred to:**
Legal Profession Act 1976, ss. 120, 122, 126, (1), 128, (2)
Solicitors Act 1974 [UK], ss. 70, (4)
Solicitors Act 1843 [UK], s. 41
Solicitors Act 1932 [UK], s. 66(2)(ii)

[**Editor's Note:** Respondents are appealing against above decision.]

## JUDGMENT

**Mohamed Dzaiddin J:**

Sometime in 1974 the petitioners who are residents of Singapore retained the respondents as their solicitors in Penang High Court originating summons No. 220 of 1974 involving the distribution of the estate of Phuah Eng Seang, deceased, under the Probate and Administration Act 1959. On 30 June 1983, the respondents informed the petitioners' solicitors in Singapore that in lieu of taxation they would like to deduct from the estate money the sum of RM45,000 and RM11,000 respectively towards their professional fees, charges and disbursements. Naturally, the petitioners instructed their Singapore solicitors to protest which they did and asked the respondents to have their bills of costs taxed. Subsequently on 7 September 1983, the respondents forwarded to the petitioners' solicitors two sets of bills of costs which were later handed to their present solicitors Messrs Shearn Delamore & Company for further action.

On 28 September 1984, Messrs Shearn Delamore & Co. filed this petition which prays for an Order of Course that the two bills of costs of the respondents be taxed on solicitor and client basis. In view of the fact that the period of more than one year had elapsed, the petitioners' solicitors filed an application by way of summons-in-chambers (encl. 7) on 18 January 1985 for an order that the time limited by s. 126 of the Legal Profession Act 1976 for the filing of this petition be extended.

Section 126(1) provides as follows:

> An order for the taxation of a bill of costs delivered by an advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, at any time within six months from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from the delivery.

On the facts before me, it is clear that s. 126 does not apply since the two bills costs were delivered by the respondents on 7 September 1983 and the originating petition as a matter of course was only filed after one year i.e., on 28 September 1984. On the other hand, this application comes under s. 128 of the Act which states as follows:

> (1) After the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the Court.

Mr. Lazar, Counsel for the petitioners submitted that on the authority of *Harry Lee Wee v. Haw Par Brothers International Ltd.* [1980] 2 MLJ 228 the Court could exercise its inherent jurisdiction to order taxation if it can be shown that there exists "special circumstances", as it is an inherent jurisdiction of the Court to exercise control over its officers.

Mr. Ng Kong Yeam contended that under s. 128(2) of the Act the petitioners were barred from obtaining any order of taxation. Section 128(2) states as follows:

> (2) No such order for taxation shall in any event be made after the expiry of one year from the delivery of the bill of costs.

Counsel further submitted that where its statutory jurisdiction is applicable the Court cannot exercise its powers under its inherent jurisdiction unless justice requires that it should be made. Alternatively, even under its inherent jurisdiction, the Court must be satisfied that "special circumstances" existed. Hence, it was submitted that on the facts as found in the affidavits, the petitioners had failed to show "special circumstances". *(Symbol Park Lane Ltd. v. Steggles Palmer (a firm)* [1985] All ER 167)

In order to consider the arguments of both Counsel it is necessary for me to consider both the nature of the Court's power under s. 126 and 128 of the Legal Profession Act 1976 and its power to order taxation of the solicitor's bill of costs under its inherent jurisdiction to exercise control over its officers.

Section 126 is concerned with the statutory right of the party chargeable to obtain an order for taxation of delivered bill of costs within the stipulated period of time from the delivery of the bill. Section 128 prescribes a time limit for taxation of bills of costs and in particular provides that such order for taxation shall not in any event be made after the expiry of one year from the delivery of the bill of costs (see s. 122(2) of the Singapore Legal Profession Act Cap. 217 which prescribes that the period of one year shall be from the **payment** of the bill of costs, which is *para materia* with the English Solicitors Act 1974 s. 70(4)).

As to the inherent jurisdiction of the Court, the authorities show that it is exercised independent of the statute. In *Storer & Co. Ltd. v. Johnson* [1890] 15 App. Cas. 203 the respondents who were London solicitors, delivered a bill of agency charges to the appellants, solicitors in Manchester, for whom they had acted for many years. Among those charges were the costs relating to a particular suit; and the appellants took out a summons to tax the

bill in respect of those costs. North J declined to make an order. The Court of Appeal considered that an order of taxation should be made on certain terms; the appellants declined the terms, and so the Court of Appeal affirmed the order of North J (see *sub nom Re Johnson & Weatherall* [1888] 37 Ch D 433). The appellants then appealed to the House of Lords. The House of Lords decided that it was not possible to make an order for taxation of part of a bill of costs under the Solicitors Act 1843; but that, in order to do justice, the Court could exercise its inherent jurisdiction to order that the costs be taxed. Lord Halsbury LC said 15 App. Cas. 203 at 206

> ... I believe that your Lordships are all of opinion that in a proceeding under the Solicitors Act we cannot do what is asked to be done by the appellants. But it was of course open to the Court to pronounce a judgment which should do justice between the parties when once the case was brought before them. This was not a case in which the summons absolutely bound the Court as to the remedy which they should administer; and I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit ...

In *Re a Solicitor* [1961] 2 All ER 321, [1961] Ch 491 an application was made for an order for taxation of a solicitor's bill of costs. The bill had been delivered on 25 November 1959 in respect of a certain matter. It was recognised that further charges would be made. On 22 December 1959 that bill was paid. On 28 February 1960 further bills were delivered. Those further bills were disputed. On 12 May 1960 the client issued summons under the Solicitors Act 1957, asking for an order of taxation. The matter came before Cross J in March 1961. There was an obstacle in the way of the Court's making an order for taxation under the 1957 Act, because, under s. 66(2)(ii) of the Solicitors Act 1932, it was provided that no order might be made after the expiration of 12 months from payment of the bill. This provision was to be contrasted with the earlier Act, the Solicitors Act 1843, by s. 41 of which the Court had jurisdiction to order taxation of a bill provided that the application was made within 12 months of payment. Since the 1932 Act was a consolidating Act, and there appeared to be no good reason for the change, it was clear that the change was unintentional; but Cross J felt obliged to give effect to it, and so was precluded thereby from making an order for taxation under the 1957 Act. Cross J held however that, on the authority of *Storer & Co. v. Johnson* (*supra*) he could in the circumstances make an order for taxation under the inherent jurisdiction of the Court. It was conceded by Counsel for the client that he had to show special circumstances such as would have justified the Court in making an order for taxation under the Act if the matter had come before the Court before the expiry of 12 months after the payment; but Cross J held that there were special circumstances. He therefore made an order for taxation under the inherent jurisdiction.

In *Harry Lee Wee v. Haw Par Brothers International Ltd.* (*supra*) the Court of Appeal upheld the decision of Wee Chong Jin CJ Rajah J at p. 230 stated as follows:

> Ground (c): On the question of whether the plaintiff is barred from obtaining any order for taxation under ss. 120 and 122 of the Legal Profession Act, the learned Chief Justice did not proceed under these sections when he made his order for taxation. He was relying on the inherent jurisdiction of the Court to exercise control over its officers and this was never in dispute before the learned Chief Justice. On this aspect of the matter his judgment says, "It

was not in dispute that the Court, in the exercise of its general or original or inherent jurisdiction over its statutory jurisdiction is inapplicable." There is therefore no need for us to say anything more on this ground.

The most recent authority on this subject is *Symbol Park Lane v. Steggles Palmer* (*supra*) where the English Court of Appeal considered s. 70 of the Solicitors Act 1974. The facts as found in the judgment of Robert Goff LJ at p. 168 are as follows:

> In 1982 Steggles Palmer acted for Symbol Park Lane in certain contentious business. On 18 January 1983, they delivered to Symbol Park Lane a number of bills of costs, including the four bills which are the subject matter of the present application. They were all gross bills totalling £22,297.35. Under the provisions of s. 70 of the Solicitors Act 1974, it was open to Symbol Park Lane to apply to the Court for an order for the taxation of those bills; but if a party makes such an application after the expiration of 12 months from the delivery of by s. 70(3) that no order for taxation shall be made except in special circumstances. In the present case Symbol Park Lane, although aware of the provisions of s. 70, allowed 12 months after the delivery of the bills to pass without making an application to the Court for an order for taxation; it was only on 9 February 1984, 21 days after the 12-month period had elapsed, that they took out an originating summons seeking such an order. This application was heard by Master Topley on 16 March 1984; he concluded that there were special circumstances, and made an order for taxation on terms. Steggles Palmer appealed from that order, and on 16 May 1984 Peter Pain J allowed the appeal, holding that there was no special circumstances. On 15 June 1984, Symbol Park Lane applied to Peter Pain J *inter partes* for leave to appeal to this Court from his decision; it was then suggested by Symbol Park Lane that the order for taxation might have been made, not under s. 70 of the Solicitors Act 1974, but under the inherent jurisdiction of the Court. The Judge refused leave to appeal, and now Symbol Park Lane have renewed their application for leave to appeal.

In his judgment the learned Lord Justice of Appeal held at p. 172:

> The structure of s. 70 of the 1974 Act is such that, in our judgment, the Court should only invoke the inherent jurisdiction to supplement the statutory jurisdiction when it is necessary to do so to put right what would otherwise be a clear injustice.
>
> In the present case, we can see no such injustice which requires the exercise of the Court's inherent jurisdiction. Symbol Park Lane had ample opportunity to obtain an order for taxation under the 1974 Act; and all that has happened is that they have simply allowed the 12-month period to elapse after the delivery of the bills of costs, without making an application. In these circumstances, we can see no substance in the argument now sought to be advanced by Counsel on their behalf.

**Applying the principles in** *Symbol Park Lane* the issue in the present case is simply this: Is there such an injustice which requires the exercise of the Court's inherent jurisdiction, which in the words of Robert Goff LJ "is necessary to put right what would otherwise be a clear injustice" to the applicants?

Mr. Lazar has urged me to proceed solely on the inherent jurisdiction by considering "special circumstances" as shown on behalf of the petitioners in the supporting affidavit of Mr.Foo Yet Ngo, an advocate and solicitor, having conduct of the matter (encl. 6). According to Mr.Foo's affidavit the two bills of costs involved matters arising from the distribution of the estate of Phuah Eng Seang (originating summons No. 220 of 1974). The bills were for work done by the respondents from the time of the filing of the originating summons in 1974 until the taking over of the conduct of the proceedings by Messrs Shearn Delamore & Co. sometime in February 1981. There were four other beneficiaries to the estate of the deceased who were represented by the late Mr. Cheah In Khean, an advocate and solicitor of 10A, Beach Street,

Penang. Certain items in the bills were duplications of other items which had already been settled and paid for out of the common fund. Messrs Shearn Delamore & Co. were instructed by the instructing solicitors in Singapore to verify these items and obtain documentary evidence form the late Mr. I.K. Cheah. The solicitors made enquiries from the late Mr. I.K. Cheah but for sometime received no response because at that point of time Mr. I.K. Cheah was extremely ill and indisposed. It is a well known fact that Mr. I.K.Cheah subsequently died as a result of a long illness. Subsequently, the solicitors were advised that the firm of Mr. I.K. Cheah had confirmed that some of the expenses had indeed been paid out of the common fund and that the firm would confirm the relevant items and figures and would revert to the solicitors as soon as possible. Consequently the late Mr. I.K. Cheah had been unable to provide the solicitors with the necessary documentary evidence. It was further deposed that the payment of costs from the common fund could be verified from one Mr.Tan Cheng Hock, an advocate and solicitor in Penang, who acted for the executors of the estate. Despite various attempts to locate the said Mr. Tan the solicitors were unsuccessful in obtaining the confirmation required.

From the above circumstances the petitioners believe that they have shown special circumstances in that the delay had arisen which was inevitable due to the need to verify the facts in the conduct of the proceedings known only to Mr.Cheah and the respondents. It is also the contention of the petitioners that the two bills of costs for the sum of RM40,540.75 and RM11,768 respectively were "oppressively" excessive and it was wrong for the respondents who were holding the sum of RM600,000 in trust for and on behalf of the beneficiaries to deduct their costs out of the trust fund without the said costs being taxed.

Mr. Ng, in reply had contended that the petitioners have not shown "special circumstances". In his affidavit (encl. 5) he deposed that the two bills of costs were sent to the Singapore solicitors on 7 September 1983. On 14 September 1983 the Singapore solicitors informed his firm that they wanted the costs to be taxed. He contended that as the two bills were submitted and forwarded to Shearn Delamore & Company there was no need for verification. They were required only to go through the bills and to mark the items as either 'P' or 'Q'. On the question of petitioners' allegation that some of the amount in the bills had been settled out of the common fund, Mr. Ng in his submission stated that this matter could be agreed between parties. As such, it was his case that the petitioners had failed to show "special circumstances."

In my judgment, I accept that there was a need for the petitioners' solicitors at that point of time to verify certain items and documents from Mr.Cheah In Khean. I also take into account that a substantial sum is claimed by the respondents as their costs and of a tacit admission by Mr. Ng that certain sum of money had already been paid out of the common fund. In the circumstances, this is a proper case where I should exercise the inherent jurisdiction of the Court by ordering taxation of both bills of costs because justice requires that such an order should be made, notwithstanding that the petitioners' solicitors had allowed the twelve-month period to elapse without making this application.

Therefore, I make this order in terms of the application and that these two bills of costs be set down for taxing by the Registrar to a date to be fixed. I also order that the costs of and incidental to this application be paid by the petitioners to the respondents in any event.

Also found at [1986] 1 CLJ 513